Supreme Court, U. S.
FILED
NOV 18 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-711

LESTER MILLET,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JULIAN R. MURRAY, JR.
MURRAY, MURRAY, ELLIS, BRADEN & LANDRY
A Professional Law Corporation
Counsel for Petitioner
612 Gravier Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3141

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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The petitioner, Lester Millet, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on September 14, 1977, rehearing denied October 19, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been officially reported, but the slip opinion appears at Appendix A, *infra*. The denial of the Petition for Rehearing and Rehearing En Banc was entered on October 19, 1977 and appears in Appendix B, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered September 14, 1977. The judgment of denial of the Petition for Rehearing and Rehearing En Banc having been entered October 19, 1977, this petition for certiorari is filed less than thirty days from the date aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the District Court erred in failing to grant a judgment of acquittal when the record reflects that there was no substantial evidence to support a conviction as to Count II, even when viewed in the light most favorable to the Government?

2. Whether the District Court erred in failing to grant a mistrial, or at least give cautionary instructions, after the prosecutor made remarks concerning the defense counsel's argument as a "cheap character assassination"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const., Amend VI.

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so do do, or commits or threatens physical violence to any person or perperty in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section ---

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. §1951.

STATEMENT OF THE CASE.

On March 11, 1976, a six count indictment was returned in the Eastern District of Louisiana in New Orleans against Lester J. Millet, Jr., the former Sheriff and Tax Assessor of St. John the Baptist Parish. All six counts charged the defendant with extortion in violation of Title 18, United States Code, Section 1951. Defendant Millet entered a plea of not guilty as to all counts on March 14, 1976.

The trial began on June 28, 1976 and continued into the third week, ending on July 14, 1976 when after six hours of deliberation the jury returned a verdict as follows: Count I - Not Guilty; Count II - Guilty; Count III - Guilty; Count IV - Guilty; Count V - Guilty; Count VI - Not Guilty. The Court declared a mistrial as to Count VII because the jury was unable to reach a verdict on that count. Later the Defendant was sentenced to six months imprisonment on Count II; the sentences were suspended as to Counts III, IV, and

V, with the Defendant to be placed on probation for a three-year period following his release from custody. It is from the judgment and sentence as to Count II, that the Defendant-Appellant prosecuted his appeal and now seeks this writ of certiorari.

STATEMENTS OF THE FACTS

Count II of the indictment alleged that the Defendant had extorted and attempted to extort Coastal Canning Enterprises, Inc. of Reserve, Louisiana in connection with the awarding to F. Bailey Inc. (a company in which the Defendant had a part interest) a subcontract for sand fill to be used at the construction site of an addition to the main facility of Coastal (R. Vol. 1, 157-167). Two witnesses were called by the government; Harry M. England, the President of Coastal Canning (R. Vol. 3, 3-42), and John Roberts, the construction superintendent of the general contractor in charge of the construction project, Carl E. Woodward, Inc., (R. Vol. 3, 47-89). The defense called three witnesses in regard to Count II; Lester J. Millet, Jr. the Defendant (R. Vol. 3, 93-148), Phyllis Monistere, Mr. Millet's secretary during the time in question (R. Vol. 3, 153-160), and Farrell Bailey, the partner of Mr. Millet in their construction business, F. Bailey, Inc. (R. Vol. 3, 161-200).

The evidence adduced at trial revealed that at sometime prior to 1969, Coastal Canning Enterprises, Inc. (hereinafter referred to as Coastal) had been in the process of surveying the Gulf Coast Area for an appropriate construction site for the location of their new bottling plant (R. Vol. 3, 22-24).

Mr. Millet who was the tax assessor of St. John the Baptist Parish at that time encouraged the officials of Coastal to locate the new facility near Reserve, Louisiana by offering his assistance in procuring a ten-year ad valorem tax exemption available to qualifying industries that choose to locate in Louisiana (R. Vol. 3, 23-103). Mr. Millet testified that the ten-year parish tax examption was an added inducement to industry to locate in Louisiana, that required the eligible businesses to hire local people, contractors and suppliers, provided that all other factors were equal (R. Vol. 3, 97-100). However, there was some question as to whether or not Coastal could qualify for the ten-year exemption because of a general exception applying to a franchise for a specific area. Mr. England spoke to Mr. Millet requesting that he do what he could in helping Coastal get the exemption and pursuant to that request Mr. Millet arranged a meeting between the Coastal officials and the state agency in charge of granting the ten-year exemption, the Commerce and Industry Department (R. Vol. 3, 103-105). After the proper procedure had been followed, Coastal was granted the exemption to be effective through approximately 1979. In the years that followed Mr. England recalled that their relationship with Mr. Millet had been friendly (R. Vol. 3, 24-25).

During the early portion of 1974 Coastal initiated the construction of an addition to its Reserve plant with Carl E. Woodward, Inc. as the contractor in charge. Prior to that, Mr. Millet had spoken to Mr. England at his Coastal office indicating that his company would be interested in building the new addition. Mr. England told him that Mr. Le Gardeur, a Carl E. Woodward official who was also present, had done several buildings for them in the past and that

England had decided to go with him (R. Vol. 3, 5, 125-126, 133). Millet then asked if his company, F. Bailey, Inc. might be able to get the contract for supplying river sand for the fill at the site. England responded by telling Le Gardeur that everyting else being equal, he would appreciate it if he would give the sand contract to F. Bailey, Inc. (R. Vol. 3, 5-6).

Carl E. Woodward's construction superintendent John Roberts made a commitment to Mr. Bailey to purchase the sand from F. Bailey, Inc. to be used at the site. According to Mr. Roberts, a man with about 24 years of experience in the construction business, approximately 5000 yards would be needed. Bailey agreed to provide that quantity of river sand at $2.25 per yard in place (meaning delivered, distributed and packed with a bulldozer) (R. Vol. 3, 50, 106-107). Roberts testified on direct examination that because he was unsatisfied with Bailey's delivery he attempted unsuccessfully to contact him over a period of several days. However, the testimony of Mr. Millet, Mrs. Monistere, his secretary, and Mr. Bailey established that their business telephone for F. Bailey, Inc. was a number used also by Mr. Millet's furniture store, and that the telephone had been answered regularly every day the store was open for business. Mrs. Monistere testified that no such message was ever received from Mr. Roberts and that if he had called she could have relayed a message to either Mr. Millet or Mr. Bailey. The testimony of Mr. Millet and Mr. Bailey corroborated Mrs. Monistere's testimony that no message to begin the delivery of the sand was ever received by them. (R. Vol. 3, 51, 52, 64, 65, 107, 108, 154-157; 171-173).

After Roberts' alleged unsuccessful attempts to contact

Bailey, he arranged with a Mr. Trosclair to supply the estimated 5000 yards of pump sand at $1.35 a yard in place. Mr. Trosclair was instructed by Roberts to begin delivery on the following Monday, March 4th (R. Vol. 3, 51-53, 73). It was established at trial that the price variance between Millet and Trosclair's offers was due to the fact that Millet was to provide river sand which is of superior quality for construction work than Trosclair's pump sand obtained from the Spillway (R. Vol. 3, 77-80, 113). But on cross examination Mr. Roberts also testified that Mr. Trosclair did not have the needed estimate of sand available for delivery. When questioned about this further Roberts said that Trosclair's supply was about 2000 yards (or 3000 yards short of Roberts' 5000 yard projection.) (R. Vol. 3, 85). When pressed further Roberts admitted that Trosclair would have had to have made numerous trips to the Bonnet Carre' Spillway to obtain more sand before the construction fill could have been completed (R. Vol. 3, 85-86).

Later during the cross examination of Roberts, the defense confronted him with several inconsistencies between his earlier testimony and the business documents that the Government had introduced relative to Count II – Government Exhibit 34. Roberts testified that weekly progress reports were completed by him during the Coastal job on each Tuesday (R. Vol. 3, 58). He examined two such reports, one for the week ending February 26, 1974 indicating that no problem was holding up the project, and a second report for the week ending March 5, 1974 showing that the sand contractor was holding up progress.[1] After

1. For the Court's convenience a brief sketch of the calendar for the period in question may prove helpful inasmuch as the testimony involved continuing references to dates in 1974.

S	M	T	W	T	F	S
Feb.					March	
24	25	26	27	28	1	2
3	4	5	6	7	8	9

examining these reports Roberts concluded that apparently his dissatisfaction with F. Bailey's delivery would have had to have occurred at some time between Wednesday, February 27, 1974 and Tuesday, March 5, 1974 (R. Vol. 3, 62-63). Then Roberts examined Government Exhibits 34 and 35 and testified that Bailey had delivered sand to the Coastal site on March 1, 1974 (R. Vol. 3, 68-70). This narrowed the period in question to between February 26, 1974 and March 1, 1974. It was established later during the trial that February 26, 1974 was Mardi Gras, a holiday in south Louisiana (R. Vol. 3, 108-109). So only two working days remained, February 27 and 28th. However, Roberts allegedly had lost a week's work because of lack of delivery after he had requested it (R. Vol. 3, 51). On cross examinations, Roberts could not explain why he had given Mr. Trosclair until the following Monday, March 4th to begin delivery when he had been dissatisfied with his alleged problems with delivery from F. Bailey, Inc. who ultimately was able to deliver sand on March 1st. (R. Vol. 3, 71).

When Bailey learned that Roberts was getting sand from another source in breach of their agreement, he notified Millet who in turn contacted England to find out why the contract had been taken away from F. Bailey, Inc. when Roberts had never even notified them to begin delivery (R. Vol. 3, 136-137). Because of the misunderstanding Millet spoke to England over the telephone. During the conversation, Millet, Bailey and Phyllis Monistere, Millet's secretary, were present in Millet's office, while England and Roberts were in England's office (R. Vol. 3, 7-8, 53-54, 119, 175, 193-195). According to Roberts who also spoke to Millet over the telephone, Millet asked him why he had taken their job away. Roberts testified that Millet was up-

set and told him to "Tell Harry England that if he doesn't buy sand from me, that I will raise his taxes so high that he will have to move out of St. John Parish." Roberts testified that he told Millet, "Well don't tell me, tell him" and then gave the telephone to England who spoke with Millet for a few moments and then instructed Roberts to buy the sand from F. Bailey (R. Vol. 3, 53-55). The Defendant denied ever threatening Roberts or England and both Mrs. Monistere and Mr. Bailey testified that they had never heard Mr. Millet threaten anyone over the telephone (R. Vol. 3, 102, 139–141, 155, 174-178).

England testified that he remembered speaking with Millet about Roberts receiving sand from another source. As England recalled Millet was upset about losing the job and England discussed the problem with Roberts and told him that they were to do business with F. Bailey, Inc. (R. Vol. 3, 7-10). It was England's recollection that the conversation over the telephone between Roberts and Millet was not friendly, they were probably mad at each other (R. Vol. 3, 9-10). England testified further that Millet did not threaten him but upon considering that Millet agreed to deliver when needed, England decided that he would stick with F. Bailey for the sand contract (R. Vol. 3, 9-10). Mr. England also testified that during that period in 1974 he was aware that Coastal's ten-year parish tax exemption was still in effect with another four to five years viability (R. Vol. 3, 24).

After receiving instructions from England, Roberts continued to receive sand delivery from Bailey pursuant to their original agreement (R. Vol. 3, 57-62). On March 8, 1974 the sand fill was completed. A total of approximately 4000 yards had been used (Government Exhibit 34). Roberts

earlier estimation had been about 25% off, a substantial error for a man of his experience (R. Vol. 3, 61).

A further survey of Harry England's testimony reveals that he had some recollection of what Roberts told him regarding his telephone conversation with the Defendant. England testified that he never recalled being threatened by Millet, but that he thought it was best do to business with F. Bailey, Inc. He testified that Roberts was very excited and mad and his impression was that it was going to be up to him (England) to straighten things out between Roberts and Millet (R. Vol. 3, 10, 27, 30). As England recalled the conversation between Roberts and Millet was "distinctly unfriendly", however England testified that he did not recall Roberts discussing any threat made by Millet to raise Coastal's taxes (R. Vol. 3 10-11).

REASONS FOR GRANTING THE WRIT

No. 1.

There was no substantial evidence presented which when viewed in the light most favorable to the Government, could uphold the Defendant's conviction on Count Two. After exploring every legal theory to support an extortion conviction under 18 U.S.C. § 1951, the conclusion reached is that the trial court erred in denying said motion.

No. 2.

Defense counsel had responded to the prosecutor's assessment of a Government witness as a man with no motive to lie, by pointing out in his closing argument several "suspicious" circumstances that had been proven by the witness'

own testimony as well as documentary evidence which had been admitted. On rebuttal, the prosecutor referred to defense counsel's argument as a "cheap character assassination", "this cheap shot", and further that "I have never seen such a cheap tatic". The defense moved for a cautionary instruction or alternative mistrial based on the prejudicial impact these comments had on the jury. The trial court denied the motion and refused to give the jury a curative instruction.

INTRODUCTION

The following arguments will deal with sufficiency of evidence and improper closing arguments by government counsel. Petitioner recognizes that writs of certiorari are usually only granted in cases having broad public interest and the United States Supreme Court cannot review every case where it is claimed that the evidence was insufficient or the prosecutor made an improper remark. However, petitioner suggests that both of the arguments to be presented hereinafter present broad and far reaching issues of national and constitutional importance.

The first argument which technically addresses itself to sufficiency of evidence is actually an attack upon the Third Circuit Court of Appeals' expansion of the definition of extortion "under color of official right" in the Hobbs Act, 18 U.S.C. § 1951, given in the case of *United States v. Mazzei*, 521 F.2d 639, (3rd Cir. 1975). As discussed hereinafter, it will be seen that that case gave unbridled discretion to prosecutors and was attacked by the defendant in an application for certiorari to this Court which was denied in 96 S.Ct. 446 (1975). Prosecutors throughout the country have seized upon the broadened definition in the *Mazzei*

case and have instituted prosecutions thereunder. Petitioner in the present case argues that even under the *Mazzei* case there is insufficient evidence but because the *Mazzei* guidelines were incorporated in the trial court's jury instructions it was almost impossible for the jury to envision a situation in which a person who is a public official can attempt to secure anything of value without it being "under color of official right". The *Mazzei* definition was clearly never intended by Congress and the Supreme Court should grant certiorari to review the issue.

Petitioner does not intend to request that the entire record in the court below be transmitted to this Court. However, because the legal issue of sufficiency of evidence is so interwoven with the facts presented at the trial petitioner has provided citations to the appropriate parts of the record in the event that either the Court or respondent determines to have the entire record transmitted to the clerk pursuant to Rule 21 of the Revised Rules of the Supreme Court of the United States.

On the issue of the impropriety of the prosecutor's closing argument petitioner suggests that the nature of the remarks and the decision by the Court of Appeals makes this case particularly well suited and deserving of review by this Court.

The closing argument by the prosecutor, and particularly the rebuttal argument which cannot be answered by the defense, has always been recognized by this Court to be an extremely potent weapon which must be used with extreme caution and restraint. The American Bar Association has even recognized the potential dangers and has

formulated appropriate guidelines to restrict prosecutors. However, as will be seen in the following argument the prosecutor's argument in the present case clearly violated the standards of this Court as well as the applicable ethical standards and yet the Fifth Circuit Court of Appeals found that the remarks were "proper" and "an appropriate reply to defense counsel's argument". Notwithstanding the importance of the issue, this Court has not dealt authoritatively with the problem since 1935! In addition to the constitutional rights of petitioner which were clearly violated, it is suggested that the "chilling effect" on defense counsel which is clearly to be anticipated from the Fifth Circuit's decision should not be countenanced. With this preface petitioner will review the applicable law and facts.

ARGUMENT I.

At the close of the Government's case the Defendant moved for a judgement of acquittal on all seven counts of the indictment, thus preserving for purposes of this petition, the question of the legal sufficiency of the evidence sustaining the conviction on Count Two. The defense contends that the trial court erred in denying this motion (R. Vol. 3, 308-309). Even if this Court views the evidence "in the light most favorable to the Government", there is no substantial evidence to support the conviction of Count Two and therefore it should be set aside, *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Although the whole record is not before this court, it is worthy of note that out of the seven counts, the Defendant was acquitted on two, the jury was deadlocked on one, leaving only four counts on which he was convicted. The trial judge who had the discretion to impose up to an

eighty-year prison sentence, apparently determined that three of the counts were of minor consequence since he suspended all three sentences. As to the remaining count the judge imposed only a six month sentence.

Proof of extortion, or attempted extortion under which the Defendant was charged requires the following elements:

(1) an interference or attempted interference with interstate commerce;

(2) the obtaining or the attempting to obtain property from another;

(3) with his consent; and,

(4) induced by the wrongful use of fear, or under color of official right.

18 U.S.C. § 1951; *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973); *United States v. Hyde*, 449 F.2d 815 (5th Cir. 1971); *United States v. Addonizio*, 451 F.2d 49 (3rd Cir. 1972).

The second count of the indictment charged alternatively as to element (4) *supra*. That is, that either the Defendant extorted or attempted to extort by the wrongful use of his alleged victim's fear, or under color of official right. For purposes of analysis, the survey of the evidence will be approached first by determining whether or not there was substantial evidence taking the view most favorable to the Government to prove that (1) the Defendant attempted to extort by the wrongful use of his alleged victim's fear; or

that (2) the Defendant attempted to extort his alleged victim by use of color of official right. There will be no discussion addressed to the issue of whether there was a successful extortion, because at most the Government's proof could have only shown an attempt to extort (R. Vol. 3, 3-200).

a. The Wrongful Use Of Fear

To prove an attempted extortion of this type, the Government was required to prove beyond a reasonable doubt that the Defendant attempted to extort his alleged victim, Coastal Canning[2] by wrongfully utilizing its fear of economic loss to gain its property. The fear that is generated within an alleged extortion victim must be reasonable fear that the Defendant intentionally instilled or acted upon because the law does not hold any man responsible for the unintended, unforeseeable or unreasonable reactions of those with whom he speaks or deals, *United States v. Quinn*, 514 F.2d 1250 (5th Cir. 1975); *United States v. Addonizio*, *supra*; *United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962).

There are numerous factors present within the evidence presented as to Count Two which show that there was no reasonable fear on the part of Coastal Canning that the Defendant would raise its taxes if it did not assure him that F. Bailey, Inc. would receive the sand contract Harry England was the only Coastal official who testified as to Count Two, and he stated that the Defendant never threat-

2. The indictment alleges that the Defendant attempted to extort Coastal Canning and Carl E. Woodard, Inc. However the threat alleged was that he would raise Coastal's taxes unless it gave the sand contract to F. Bailey, Inc. No threat of loss of any sort was alleged or proven as to Carl E. Woodard, Inc. (R. Vol. 3, 3-200).

ened his company with higher taxes (R. Vol. 3, 29, 30, 34).[3] Furthermore, it was not shown that Coastal stood in reasonable fear of higher taxes because England was well aware that Coastal was operating under a ten-year tax exemtion which was to continue for at least another five years (R. Vol. 3, 23-24). Because both England and the Defendant understood the effect of the exemption, Coastal Canning could not have been in reasonable fear of economic loss (R. Vol. 3, 23-24).

John Roberts had testified that the Defendant had told him that if F. Bailey did not get the sand contract he would raise Coastal's taxes. There could be no reasonable fear on the part of Roberts or Carl E. Woodward, Inc., even if we assume that this was true, because the Defendant could have exercised no control over either one, and the raising of Coastal's tax could not have harmed Carl E. Woodward, Inc. Furthermore, the Defendant's denial that he had ever threatened Coastal through Roberts by way of the telephone conversation was corroborated by the testimony of Mrs. Monistere and Mr. Bailey who were both present when the conversation occurred (R. Vol. 3, 135, 175, 176).

b. Under Color Of Official Right

The second type of extortion which the Hobbs Act prohibits is termed extortion "under color of official right", 18 U.S.C. § 1951. To prove this type of extortion, the

3. Although at trial England stated that no threats were made by the Defendant against his company, it is understandable that the grand jury could have indicted the Defendant on England's testimony given at a second appearance, some eight months subsequent to his initial appearance, after his memory "got better". Mr. England was cross examined about his grand jury appearances and reference to that testimony will give this Court some insight as to how far the Government stretched to make a case against the Defendant (R.Vol.3, 34-36).

Government need not show that the alleged victim was coerced through fear, force or violence, but that he parted with his property because of his reasonable belief that the Defendant had a certain official power, *United States v. Kenny* 462 F.2d 1205 (3rd Cir.) cert. denied, 409 U.S. 914 (1972); *United States v. Mazzei*, 521 F.2d 639 (3rd Cir.) cert. denied 96 S.Ct. 446 (1975). However, what acts by the alleged extorter the Government is required to prove to satisfy the element of "under color of official right" is an issue which is unresolved.

The legislative history of the Hobbs Act sheds very little light on what conduct Congress intended to make criminal by using the term "under color of official right". See, 44 Fordham L. Rev. 852 (1976). There has to date been no word from this Court as to the definition of the term. However, an extreme view of its meaning was recently expressed in the *Mazzei* case, *supra*, where the Third Circuit held that regardless of whether the Defendant was exercising or attempting to exercise any *de jure* or *de facto* power, if he instilled in his victim the reasonable belief that he was, and in so doing gained access to the victim's property, extortion had been committed. As the dissenters in *Mazzei* argued, this new theory of extortion would not require the misuse of official power as was required by the common law, but instead would punish mere "influence peddling" by a prominent politicion. The critical element to prove extortion "under color of official right" for the Mazzei majority was the subjective perception of the victim rather than any objective act by the official. This ex-

4. The facts in Mazzei were that a state senator had received payments from his victims to procure his aid in a realm of state government over which he had no actual or apparent authority.

pansion of the Hobbs Act has been justly criticized by one commentator, 44 Fordham L. Rev. 852 (1976).

The defense asserts that the *Mazzei* case is a step too far towards a completely free rein to the discretion of prosecutors, rather than being a correct interpretation as to the intention of Congress; or as Judge Gibbons for the dissenters remarked, the majority holding had "cut the disjunctive clause loose from the anchor of the common law and set it adrift upon a sea of prosecutorial discretion", *Mazzei* at p. 655. Carried to its logical extreme, a Defendant need not even hold public office to commit this sort of extortion, and therefore the Hobbs Act could be stretched to meet almost any situation. Certainly it was not the clear intent of Congress to make such conduct criminal, and regardless of the pros and cons of allowing prosecutors to legislate such a definition, this Court has frequently warned that an "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Bass*, 505 U.S. 336,347(1971).

As applied to the present case, the evidence clearly showed that the Defendant had no power to raise the taxes of Coastal Canning (R. Vol. 3, 23-24, 97-98, 104-105). Because he had no such power, the only possible way in which his conviction may stand is upon the *Mazzei* theory, that even if he did not have the power, if Coastal Canning (as represented by the president, Harry England) reasonably "thought" he did posses that authority, he could be found guilty of attempted extortion. For the reasons discussed above, the defense contends that the *Mazzei* rationale should not be adopted by this Court. However, even under *Mazzei*, it is clear from England's testimony that he knew

his company was tax exempt and he was not placed in any reasonable belief that the Defendant could raise his taxes (R. Vol. 3, 23-24). Millet knew that England was aware of the exemption (they had worked together to get it) so there is no basis for concluding that he was attempting to put England in reasonable belief that he had power over Coastal Canning.

At most the Government proved that in a heated exchange with John Roberts the Defendant made an irrational statement that could not have put anyone involved in reasonable belief that he would raise Coastal's taxes. It is precisely for this type of situation that the aforementioned cases require that the alleged belief be "reasonable". It was never the intention of Congress to ensnare unwitting citizens who might blurt out some ridiculous "threat" that everyone knows cannot be carried out. Only under *Mazzei* could the defendant have been convicted and that case is not a correct interpretation of 18 U.S.C. § 1951.

ARGUMENT II.

As the Court will recall, the Defendant appealed only as to Count Two of the indictment. However as the Statement of Case indicated the trial on seven counts of extortion extended into three weeks of testimony through the calling of over thirty witnesses. The factual complexity of the case was a major obstacle in the presentation of the defense, and both the Government and defense counsel struggled throughout the trial to define the proper issues for the jury as to each of the seven separate counts. Because of the hours and hours of testimony that the jury had heard day after day, the crucial importance of the closing argument

was heightened to the role of an invaluable tool by which either the prosecution or defense could hope to finally draw together the theory of their case. These brief remarks are by way of observation so that the Court will understand the context in which the jury was exposed to final arguments of counsel.

After the prosecutor's argument, defense counsel began his closing argument with a detailed emphasis on the basic mechanics of the criminal trial, i.e. defining the Government as the party who carries the burden of proof, the reasons for the Government's being allowed rebuttal argument and the legal nature of the presumption of innocense (1st Supp. R., 2-5). After these opening observations counsel then went on to review the evidence, or lack thereof, as to each count of the indictment.

When defense counsel arrived at the point in his argument where he began reviewing Count Two, he felt compelled to comment upon the prosecutor's characterization of John Roberts, the construction superintendent for Carl E. Woodward, Inc., as a Government witness that he no conceivable motive for lying. As noted in the previous argument in this petition, the prosecution's case had been tenuous at best, and Roberts had been the only witness relative to the second count who had actually testified that the Defendant had threatened Coastal Canning (allegedly through him over the telephone.) A review of the testimony of Harry England the only other Government witness called regarding Count II, shows he floundered from one position to another interspersed with frequent memory lapses. Understandably, the prosecution must have felt a special urging to vouch for the credibility of Roberts.

Defense counsel naturally responded to the prosecution's representation of Roberts as a man with no reason to lie by directing the jury's attention to several of the unexplained and puzzling aspects of Roberts' testimony. Counsel questioned Roberts' motivation in being so intent on cancelling his commitment to F. Bailey, Inc. because of alleged poor delivery only to award the job to Mr. Trosclair, (with whom he had previously worked) whose beginning date for delivery was later than Bailey's. He also pointed out that the job had been originally estimated according to Roberts to require about 5000 yards of sand for completion, whereas Roberts admitted under oath that according to his company's records only 4000 yards were actually used. Counsel remarked on this twenty-five percent error by Roberts, a man of over twenty years of construction experience. All of these facts as revealed by Roberts's own testimony "sound suspicious" counsel commented. He emphasized that: "Granted, this is a theory, but there is some suspicion there." (1st Supp. R. 37-40). All of the inferences drawn by defense counsel were reasonably deductible from the evidence in the case and therefore the proper subject of argument,[5] *Luttrell v. United States*, 320 F.2d 462 (5th Cir. 1963).

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5. Although defense counsel had ample grounds for questioning the motives and veracity of Roberts, such a factual basis is not required either legally or ethically.

[Defense counsel] must be and is interested in preventing the conviction of the innocent, but absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State's case in the worst possible light, regardless of what

In its summation, the Government attorney attacked defense counsel directly and by name. Referring to the defense's evaluation of the testimony of the witness Johnny Roberts, the Government called the defense's summation a "cheap character assassination". (1st Supp. R. 53). About the defense theory that Roberts might have lied, the Government said:

> But now Mr. Murray gets in here, and in closing argument, when Johnny Roberts is out somewhere, and takes the *cheap shot* at him by saying that he was involved in some way with Trosclair.
>
> * * *
>
> But now, up here now, when he can't defend himself, he brings it up. *I have never seen such a cheap tactic.* (1st Sup. R. 53-54). (Emphasis added).

It is inconceivable that the appellate court could have ruled such remarks to be proper. Perhaps (to be argued *infra*), such comments could possibly be ruled "insubstantial". But proper and appropriate? As the Court is aware, summation is the time to draw the inferences as to the evidence and the witnesses who gave same. This is what the

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(Footnote 5 - Continued)

thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, *we countenance or require conduct which in many instances has little, if any, relation to the search for truth. United States v. Wade,* 388 U.S. 218, 257-258; (1967) (Emphasis Supplied).

defense had done (and, it is submitted, in an ethical and appropriate manner). But the prosecutor did not discuss the testimony. Neither did he offer alternative interpretations or return to defend his theory already advanced. Rather than join issues, rather than attack the defense theories, the prosecutor chose to focus on the defense counsel.

Berger v. United States, 295 U.S. 78 (1935) is the source of the often quoted statement of the duty of a government prosecutor:

> The United states Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. *He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.* Id. at 88 (Emphasis added).

Because he represents the government and supposedly seeks to protect the interests of society, the prosecutor is viewed with great respect by the jury. There is "an implicit stamp of believability to what the prosecutor says". *Hall v. United States*, 419 F.2d 582, 583-84 (5th Cir. 1969). Because of the position in which he stands, the prosecutor should refrain from comments which interpose his personal opinion or past experience as a prosecutor, *Lawn v. United States*, 355 U.S. 399 (1958); *Hall v. United States, supra; Gradskyp v. United States*, 373 F.2d 706 (5th Cir. 1967); *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962); *Thompson v. United States*, 272 F.2d 919 (5th Cir. 1959), cert. denied 362 U.S. 940 (1960).

Thus, when an experienced prosecutor tells the jury that the defense has used cheap tactics, the jury which is without experience in criminal trials is inclined to believe precisely that. If the jury believes the defense counsel has used wrongful tactics calculated to mislead them on an important point, that fact must be prejudicial to the defendant.

This belief by the jury and its prejudice is magnified when the prosecutor starts testifying by commenting on facts not in evidence. Worse yet, this is opinion testimony: "I have never seen such a cheap tactic." (1st Supp. R. 54). The A.B.A. *Standards Relating to the Administration of Criminal Justice* prohibits such statements in the prosecution function:

> 5.8(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
> (d) The prosecutor should refrain from argument *which would divert the jury from its duty to de-*

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6. Mr. Heusel was in fact a very experienced prosecutor and he signed the indictment that was given to the jury as, "First Assistant United States Attorney". Therefore, his characterization of the defense argument as the cheapest tactic he had ever seen, carried special significance for the jury.

> *cide the case on the evidence*, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
> 5.9 It is unprofessional conduct for the prosecutor intentionally *to refer to or argue on the basis of facts outside the record* whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice. (Emphasis added).

"Opinions of prosecutors or defense counsel are not issues to be submitted to the jury." *Dunn v. United States*, *supra*, at 886. "It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence. . ." *Id.* at 885-86. The credibility or reliability of counsel is a "false issue" in a trial, not properly before the jury. *Hall v. United States*, *supra*, at 586 (5th Cir. 1969).[7] Accord: *Greenberg v. United States*, 280 F.2d 472, 474-75 (1st Cir. 1960). In short, the few prior decisions of this Court and all applicable prosecutorial standards clearly demonstrate that the argument in this case by government counsel was *not* proper.

At the absolute minimum, improper remarks by counsel should be followed by an immediate, clear and forceful curative instruction by the judge. *Hall v. United States*, *supra*, at 585. Such an instruction was found in *United States v. Arenas-Granada*, 487 F.2d 858, 859 (5th Cir. 1973). It is questionable that even a curative instruction can remove the damage done to the defendant in the eyes of the jury. "It is better to follow the rules than to undo what has been done. Otherwise stated, 'one cannot unring a bell'; . . .'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.' " *Dunn v. United States*, supra, at 886.

7. In *Hall*, Canon 15 of the *Canons of Professional Ethics*, American Bar Association is cited as being applicable to the issue of a prosecutor giving his personal opinion:
> It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The question of whether an instruction can cure improper remarks does not arise in this case. No such instruction was given, although it was requested. The trial judge did state to the prosecutor "Frankly, I might say that I don't approve of such tactics myself. . ." *United States v. Millet*, slip opinion at 5811, n. 10 (5th Cir. 1977). But this statement was made out of the presence of the jury. No comment or instruction was given to the jury. *Id.*

United States v. Arenas-Granada, *supra*, cited by the appellate court is inapposite on two grounds. In that case a curative instruction *was* immediately given after the judge "cut short" the comments. Further, the offensive remarks there were given by a witness, not by the prosecutor. Likewise, in *United States v. Rhoden*, 453 F.2d 598 (5th Cir. 1972), cited by the court, there were cautionary instructions given. Although no instruction was given in *Lipscomb v. Estelle*, 507 F.2d 708 (5th Cir. 1975), cited by the court, no instruction was requested there, as was done in this case. Also, *Lipscomb* was a habeas corpus case involving a state prisoner convicted and affirmed within the state courts, not a United States prosecutor.

The final case cited by the appellate court, *United States v. Maizumi*, 526 F.2d 848 (5th Cir. 1976) involved no instruction, but again none had been requested. Both counsel

had used "equally improper remarks". Such was not plain error when viewed against the failure to object. *Id.* at 851. In this case there was an objection and a specific request for a curative instruction was made.

The remarks of the prosecutor were improper. They focused on the defense counsel, involved personal opinion and related to facts not in evidence. They were inherently prejudicial. They were not cured by any instruction. Especially in light of the closeness of the evidence as to guilt (to be discussed *infra*), this set of remarks so prejudiced the jury as to require reversal. This is a case where "zeal outran fairness". *Dunn v. United States, supra*, at 885; *Handford v. United States*, 249 F.2d 295, 296 (5th Cir. 1957).

In the instant case of the Court of Appeals seems to say that the prosecutor may make a personal attack on defense counsel in closing argument if the defense counsel has made improper remarks. Assuming *arguendo* that is correct, what was the alleged "cheap tactic" used by the defense counsel? If the prosecutor's argument were in fact an "appropriate reply", then logically it must be assumed that there was something improper done by defense counsel. What was it?

All the court of appeals said about the defense argument is contained in one sentence. "The defense, in closing argument, made some comments about its theory of the facts and one of the principal Government witnesses." *United States v. Millet, supra*, at 5811. From this section undersigned counsel and indeed all of the criminal defense bar are unable to extract the standard or rule of law. What must be done by defense counsel in the future to avoid being the subjects of such personal attacks and the resulting

prejudice to their clients?

So long as the comments of counsel -- for either the Government or the defense--do not go beyond the inferences of the testimony of witnesses it would seem proper. A.B.A. *Standards, supra.* The record clearly reveals that the witness Johnny Roberts had testified in the trial. The prosecutor argued that Mr. Roberts had no reason to lie. The defense in response sought to show that Mr. Roberts' testimony also supported a contrary theory, namely that he had lied and had a good motive for doing so. Since this argument was grounded directly on Roberts' testimony, it would seem to be proper. In fact, prior to the present decision, counsel had always assumed that he had a duty to challenge the government's witnesses.[8]

It would seem important for the appellate court to explain how defense counsel erred. If there were no error or impropriety in the defense argument, then the prosecution argument certainly cannot be deemed an "appropriate reply".

The remarks of the prosecutor were certainly not "insubstantial." Assuming *arguendo* that there was enough evidence to convict the defendant under *Glasser v. United*

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8. The Fifth Circuit's decision mentions but does not evaluate the defense's failure to interrupt the argument to object. An objection, request for instructions, and an alternative motion for a mistrial were all urged immediately after the summation when the jury had been removed. It is settled law that it is not necessary to interrupt the argument to protect the objection. It is understandable to keep from underscoring prejudicial remarks. *United States v. Grunberger*, 431, F. 2d 1062, 1069 (5th Cir. 1970). This is especially so when, like the instant case, the prosecutor is criticizing the tactics of the defense. To object then would tend to be more prejudicial. *Wagner v. United States*, 263 F.2d 877, 883 (5th Cir. 1959).

States, 315 U.S. 60, 80 (1942), it was just barely so. Count II dealt with extortion. Only one Government witness testified that the threat had been made. The only other Government witness on this count testified that no threat had been made. Three defense witnesses testified that the threat was *not* made. Only one witness believed or stated that such a crime was committed. It was, therefore, the credibility of that witness upon which the whole case hinged. The jury, as finder of the facts, was confronted with whether to believe his testimony.

The closeness of the case and the importance of the witness becomes relevant to the remarks by the prosecution to the jury. His credibility had been questioned by the defense. It is in this context of seeking to support his only witness that the prosecutor attacked not the soundness of the argument, inferences or facts, but the defense counsel and his methods. This certainly must have diverted the jurors' attention away from the very legitimate questions raised by the defense and transferred it to the "false issue" of defense counsel's ethics.

When a remark of an attorney is improper, the courts have always looked to see whether an instruction was given, *supra,* and also has weighed the evidence. "Error which may be deemed relatively minor in other circumstances may reach prejudicial proportions in a close factual case. . ." *United States v. Grunberger, supra,* at 1067. By contrast, the court in *United States v. Rhoden, supra,* found the evidence overwhelming and therefore held the impropriety did not require reversal. "When the scales of justice may tip either way and a man's liberty is in the balance, courts must be especially vigilant to protect an accused." *Hanford v. United States, supra,* at 296.

The evidence in this case made the decision close at best for the Government. It could tip either way. The key was the testimony of Roberts. The prosecutor, as with all prosecutors, had great weight by virtue of his position to sway the jury. This he improperly did, requiring reversal.

The decision by the court of appeals ruling that the prosecutor's argument was proper and appropriate is clearly in error. The statements were improper and inappropriate. No reported decision should be allowed to stand that sanctions and encourages personal attacks on defense attorneys who are only doing their duty in accordance with the mandates of the Constitution and this Court. Such a decision will inevitebly have a "chilling effect" upon counsel who must chose between presenting a vigorous defense and protecting their professional reputations. However, the important issue is not the wounded sensibilities of defense counsel, but rather the diminution of his effectiveness and the resulting harm done to his client.

CONSLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MURRAY, MURRAY, ELLIS,
BRADEN & LANDRY
A Professional Law Corporation

JULIAN R. MURRAY, JR.
Attorney for Petitioner
612 Gravier Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3141

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on the respondent by placing copies of same in the United States mail, postage prepaid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Gerald Gallinghouse
United States Attorney
500 Camp Street
New Orleans, Louisiana 70130

This 17th day of November, 1977.

JULIAN R. MURRAY, JR.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lester J. MILLET, Jr.,
Defendant-Appellant.

No. 76-3783.

United States Court of Appeals,
Fifth Circuit.

Sept. 14, 1977.

Defendant was convicted before the United States District Court for the Eastern District of Louisiana at New Orleans, Frederick J. R. Heebe, Chief Judge, of extortion, and he appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) raising issue concerning Government's alleged failure to comply with pretrial agreement by way of posttrial motion was so untimely as to amount to waiver; (2) denial of motion to dismiss superseding indictment was not error; and (3) Government's remarks on rebuttal following defense counsel's closing argument were not improper but constituted appropriate reply.

Affirmed.

1. Constitutional Law ⇐257
   Criminal Law ⇐700

Government has obligation to fully comply with any and all agreements and promises it makes with and to defendants, and any noncompliance is to be interpreted as a serious breach of Government's duty, as well as a possible violation of a defendant's constitutional due process rights.

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2. Criminal Law ⇐700

Where defense counsel knew at least by Friday before trial of Government's alleged noncompliance with pretrial agreement, defense did not file motion for continuance nor request trial judge prior to trial to consider matter nor did defense offer any objection, indication or remark to trial judge during Government's case regarding Government's alleged noncompliance but did nothing until trial was over and defendant had been convicted, and defendant made no showing that he suffered any prejudice as result of alleged nondisclosure of grand jury transcripts as provided by agreement, raising issue concerning Government's alleged failure to comply with pretrial agreement in posttrial motion was so untimely as to amount to waiver.

3. Indictment and Information ⇐15(1)

Superseding indictment may be returned at any time before trial on the merits.

4. Indictment and Information ⇐15(1)

Trial court did not err in denying motion to dismiss superseding indictment, which was filed six days before trial on merits commenced; moreover, count for which defendant received sentence of imprisonment and which was only count before Court of Appeals was substantially identical in the two indictments.

5. Threats ⇐7

Evidence was sufficient to sustain defendant's conviction for extortion de-

spite his contention that evidence failed to show any reasonable fear on part of alleged victim, any threat or that he had official power to carry out alleged extortion. 18 U.S.C.A. § 1951.

6. Criminal Law ⇐726

Where defense in closing argument made some comments about its theory of the facts and one principal government witness, Government's remarks on rebuttal giving its assessment of defense argument were not improper but were appropriate reply to defense counsel's argument and could only have had insubstantial and insignificant impact on jury's verdict, foreclosing finding of reversible error.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG and FAY, Circuit Judges, and DUMBAULD,* District Judge.

FAY, Circuit Judge:

Lester J. Millet, appellant, is a former sheriff and tax assessor of St. John the Baptist Parish, Louisiana. On March 11, 1976, the Grand Jury returned a six-count indictment charging appellant with extortion in violation of the Hobbs Act, Title 18, United States Code, Section 1951. Defendant Millet entered a plea of not guilty as to all counts on March 24, 1976.

*Edward Dumbauld, District Judge of the Western District of Pennsylvania, sitting by designation.

Pre-trial motions included a motion for speedy trial and a motion for discovery and inspection. The court held the speedy trial motion moot because a trial date had been set for Monday, June 28, 1976. With respect to the motion for discovery and inspection, the Government and the defense at a pre-trial hearing before the Magistrate reached an agreement as to what would be turned over to the defense.

On June 22, 1976, six calendar and three working days before trial, the Grand Jury returned a seven-count superceding indictment. The superceding indictment additionally charged the defendant with attempted extortion in all of the former counts as well as one new substantive count. The court denied a defense motion to dismiss the superceding indictment.

The trial began on June 28, 1976 and continued into the third week. The jury returned the following verdict: Guilty as to Counts II, III, IV and V; Not Guilty as to Counts I and VI. The court declared a mistrial as to Count VII because the jury was unable to reach a verdict on that count. Subsequently, the court sentenced the defendant to six months imprisonment on Count II, suspended the sentences as to Counts III, IV and V, and imposed a three year period of probation following the defendant's release from custody. From the judgment and sentence as to Count II, the defendant

brings this appeal.[1] We affirm.

I

The appellant assigns four grounds of error, the first of which is appellant's contention that the trial court incorrectly denied appellant's motion for new trial after the Government failed to comply with its pre-trial discovery agreement. Prior to the trial, defendant filed a group of standard discovery motions including a request for a copy of the Grand Jury testimony of all witnesses favorable to the defendant, pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Defendant further requested that the desired evidence be made available to the defense prior to trial because of the complex nature of the case and that any problems with the materiality or exculpatory nature of the evidence be resolved by the court *in camera*. The Government's written answer to the defense motion asserted that it had no *Brady* material in its possession. The matter came before the Magistrate at a pre-trial hearing at which time counsel for the Defendant

1. Appellant points out that, although he was convicted on four counts, he is only appealing as to Count II for which he received a sentence of imprisonment. Appellant explains that this is due to his being neither a rich man nor a pauper, but rather a man of modest means who has expended his savings on defending these charges thus far. However, we possess no presumption of guilt as to Count II based on the fact that appellant did not appeal the verdict on the other counts.

asserted that the motion was a bit unique from the "standard type of *Brady* motion" in that he was specifically requesting access to the Grand Jury testimony of witnesses who were not to be called at trial. [In accordance with the Jencks Act, 18 U.S.C. § 3500, the Government already consented to give copies of the testimony of all Grand Jury witnesses the Government intended to call at trial.] The Magistrate's response was that rather than conduct an extensive *in camera* inspection for possible *Brady* material, the Government might turn over the transcripts in question to the defense to allow it to conduct the perusal. To this suggestion the prosecutor responded:

> As to *Brady* material, as to determining what is Brady material, I don't believe that it's the Government's position in this or any other case, that we should be required to produce everything that the Grand Jury has heard. But I think a reasonable alternative might be that on these counts on which the Defendant is charged, that the Government would offer to turn over at least in advance now, a list of all the witnesses who were called before the Grand Jury on the counts charged in the indictment and that at a reasonable time prior to trial, preferably at the time of presenting Jencks Act, we would make that, the testimony of all those witnesses available, both Jencks Act material and the other witnesses who may or may not be witnesses at trial.

The essence of the agreement, then, was that the Government would give the defendant first a list and then the full testimony of all the witnesses who appeared before the Grand Jury and testified regarding the various counts in the indictment. The Government agreed that a reasonable time for producing copies of these witnesses' testimony would be 5 P.M., Thursday, June 24.

Appellant contended then, and contends now, that the material the Government delivered on June 24 failed to include the testimony of "numerous" Grand Jury witnesses.[2] Appellant notified the Government the next day that it did not consider the Government to have complied with its pre-trial agreement. The defense did not raise the matter prior to or during the trial purportedly because, without a transcript of the Magistrate's hearing, appellant's counsel was not absolutely certain that his recollection of the extent of the agreement was correct. After the trial was completed, appellant raised this issue before the district court in a motion for a new trial,

2. Eighty-seven witnesses appeared before the Grand Jury in the investigation of this case and related matters. Prior to trial the Government turned over to the defendant Grand Jury testimony of 34 witnesses, leaving the testimony of about 50 Grand Jury witnesses undisclosed to the defense. F.B.I. statements of an additional 30 witnesses were also turned over to appellant.

contending that it was prejudiced by the Government's non-compliance.[3]

Defense counsel also filed a motion for issuance of a subpoena duces tecum in order to review the undisclosed testimony prior to the hearing on his motion for a new trial. The Government filed a motion to quash the subpoena duces tecum, contending that it had fully complied with the pre-trial requirements of *Brady* and *Jencks*, *supra*, and that compliance with the subpoena may interfere with a continuing investigation of appellant on matters other than those involved in the indictment and about people other than appellant.

The district judge reviewed *in camera* the Grand Jury testimony requested by appellant which was not furnished by the Government. This included testimony of approximately 50 witnesses. Finding that the undisclosed Grand Jury testimony would not have affected the judgment of the jury or the outcome of the trial on the question of guilt or on the issue of punishment, the district court denied appellant's motion for new trial and granted the Government's motion to quash the subpoena duces tecum.

Appellant maintains in this appeal that he had relied upon the pretrial

3. Defendant claims that he was partially relying on the materials promised by the Government for the preparation of his defense. Defendant's counsel intended to use the testimony of various Grand Jury witnesses rather than personally interview them.

agreement made by the Government, as noted above, and that the Government should not be allowed to breach said agreement with impunity. Appellant contends that such a breach denied him due process of law.

The record in this case reveals that the court below reviewed the materials *in camera* and took no action favorable to the defendant, implying that the district court found no breach. The appellant respectfully suggests that the district court focused on the wrong issue, namely compliance with *Brady* requirements rather than a pre-trial agreement voluntarily made by the Government.

[1] At this point of the proceedings we find appellant's non-compliance argument to be without merit. Unequivocably, the Government has the obligation to fully comply with any and all agreements and promises it makes with and to defendants and we would interpret any non-compliance as a serious breach of the Government's duty, as well as a possible violation of a defendant's constitutional due process rights.[4] However, under the facts of the instant case, we need not decide whether the Government breached its agreement because we find that appellant waived his right to complain about any possible non-compliance on the part of the Government.

4. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *United States v. Ross*, 511 F.2d 757 (5th Cir. 1975); *United States v. Scanland*, 495 F.2d 1104 (5th Cir. 1974).

[2] The alleged agreement was made eight weeks before trial. The material was supposed to be delivered the Thursday before trial began. Defense counsel knew at least by Friday before the trial started that the Government had not complied with the agreement, if that were correct. The defense did not file a motion for continuance nor request the trial judge prior to trial to consider the matter. Neither did the defense offer any objection, indication or remark to the trial judge during the Government's case regarding the Government's purported non-compliance. There was no request for an adjournment or short recess after the Government's case in an attempt to use the material or obtain witnesses for the defendant. Defendant made no motion, no objection—he did nothing, until the trial was over and the jury had convicted him. During almost three weeks of trial and several days prior to trial, appellant had ample opportunity to assert his claim. Although appellant asserts prejudice, he has made no showing that he suffered as a result of any non-disclosure of all grand jury transcripts. This Court is of the opinion that raising this issue by way of a post-trial motion was so untimely as to amount to a waiver. *See United States v. Urdiales*, 523 F.2d 1245, 1247 (5th Cir. 1975), *cert. denied*, 426 U.S. 920, 96 S.Ct. 2625, 49 L.Ed.2d 373.

II

Appellant next submits that the trial court erred in denying his motion to dismiss the superceding indictment. Appellant concedes that the Government notified appellant that it intended to seek a

superceding indictment prior to June 22, 1976, the date the superceding indictment was filed. However, appellant claims, the Government gave him the impression that the superceding indictment was designed only to correct some clerical errors and make some stylistic changes, when in fact the superceding indictment contained substantial changes by the addition of attempt charges and one entirely new and different substantive count.

Appellant filed a motion to dismiss the superceding indictment seeking alternatively to have the Government proceed on the original indictment, that the new count be dismissed, or, that if the superceding indictment were allowed to stand, that the new count be severed from the remaining counts. The trial court denied the motion in all respects.[5]

Appellant asserts that the Government's last minute changes in the pending charges substantially interfered with his preparation for trial and jeopardized his right for speedy trial,[6] presenting

5. It is undisputed that the Government possessed no new information when it sought the superceding indictment than what it had when filing the original indictment. Allegedly the addition of one more count was a strategical decision concerning the admissibility of system and intent as evidence.

6. Due to the personal strain and desire to negate the charges against him, appellant had filed a motion for speedy trial early in the proceedings. The trial court denied this motion as the date for trial had been set.

him with the unfair choice of relinquishing his right to a speedy trial or his right to adequate trial preparation and specific knowledge of the charges against him.

[3, 4] We find the trial court did not err when denying the motion to dismiss the superceding indictment. This Court has held that a superceding indictment may be returned at any time before a trial on the merits. *United States v. White*, 524 F.2d 1249, 1252–53 (5th Cir. 1975), cert. denied, 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 375. In the instant case, the superceding indictment was filed six days before the trial on the merits commenced. Moreover, count two, the only count before us, was substantially identical in the two indictments.

III

[5] Appellant's third contention of error concerns the trial court's denial of appellant's motion for judgment of acquittal. Appellant contends the evidence is legally and factually insufficient[7] to sustain a conviction on Count II.[8]

7. Appellant claims that the crime of extortion requires the obtaining of another's property with the other's consent *induced by the wrongful use of fear, or under color of official right.* Appellant contends that the evidence failed to show any reasonable fear on the part of the alleged victim, any threat, or that appellant had official power to carry out the alleged extortion. With these essential factors lacking, appellant argues, the evidence is insufficient and the conviction improper.

8. See n. 1 *supra*.

Viewing the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we find the evidence sufficient to sustain appellant's conviction on Count II. The jury could reasonably, logically, and legally infer from the evidence presented that appellant was guilty beyond a reasonable doubt of violating the statute under which he was charged. This allegation of error is without merit.

IV

[6] Appellant lastly alleges that the Government committed reversible error during its closing argument in rebuttal. The defense, in closing argument, made some comments about its theory of the facts and one of the principal Government witnesses. On rebuttal, the Government retorted with its assessment of the defense's argument.[9] Appellant

9. The section of the Government's rebuttal argument about which appellant now complains is the following:

> The only thing that . . . I feel that I have an obligation and duty to defend that Mr. Murray [defense counsel] brought up, the only point is the cheap character assassination of Johnny Roberts [Government witness] . . . Mr. Murray gets in here, and in closing argument, when Johnny Roberts is out somewhere, and takes this cheap shot at him by saying that he was involved in some way with Trosclair . . . I have never seen such a cheap tactic.

Appellant submits that the Government's repeated use of the word "cheap," in its various phrases, prejudiced the jury against the appellant and his counsel.

contends that the Government's words, the last ones to be heard by the jury, must have had a devastating impact upon the jury's impression of the defense, denying appellant a fair trial. Appellant notes that he did not object at that point because he did not want to accentuate the Government's comments and that the trial court later denied appellant's request for a curative instruction.[10]

Having reviewed the record and the content of the closing arguments of the Government and the defense, we find that the Government's remarks were not improper and were an appropriate reply to defense counsel's argument. The Government's comments could only have had an insubstantial and insignificant impact on the jury's verdict, foreclosing a finding of reversible error. *See United States v. Maizumi*, 526 F.2d 848, 850 51 (5th Cir. 1976); *Lipscomb v. Estelle*, 507 F.2d 708, 710 (5th Cir. 1975); *United States v. Arenas-Granada*, 487 F.2d 858, 859 (5th Cir. 1973); *United States v. Rhoden*, 453 F.2d 598, 600 (5th Cir. 1972). This argument, like the ones above, lacks merit.

The judgment and conviction are AFFIRMED.

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10. In denying the appellant's request for a special jury instruction and his motion for mistrial, the district court, without the jury present, stated: "Frankly, I might say that I don't approve of such tactics myself, . . . but I don't think it was so prejudicial that I should make any comment to the jury."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3783

D. C. Docket No.CR-76-203 "B"

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LESTER J. MILLET, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GOLDBERG and FAY, Circuit Judges, and DUMBAULD,* District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 14,1977

Issued as Mandate:

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*District Judge of the Western District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

October 19,1977

TO ALL PARTIES LISTED BELOW:
NO. 76-3783
U.S.A. v. LESTER J.MILLET,JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41,Federal Rules of Appellate Procedure for Issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
CLERK

By:s/Brenda M.Hauck
Deputy Clerk

**on behalf of appellant, Lester J. Millet,Jr.,

cc: Mr. Julian R. Murray, Jr.
Messrs. Walter J.Rothschild
Cornelius R. Heusel
Ms. Mary Williams Cazalas

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED: Nov. 2, 1977
EDWARD W. WADSWORTH
CLERK

NO. 76-3783

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
LESTER J. MILLET, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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O R D E R :

( ) The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including November 18, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the cer-

tiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

s/ Peter T. Fay

United States Circuit Judge